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# Independence and WTO Law

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## 1. Introduction

A volcano erupts in Iceland and flights across Europe are grounded, causing damage to supply and value chains.[2] A tsunami hits the coast of Japan and production lines across Asia and much of the rest of the world grind to a halt.[3]

These two episodes - both very real and very devastating - illustrate the degree to which the modern global economy, and by extension, the international community, have become a function of interdependence. As a matter of economics interdependence sustains current living standards. Life cannot continue without it. One former British Prime Minister has gone so far as to describe interdependence as "the defining characteristic of the modern world."[4]

In the midst of this ceaseless inter-relating and productivity has come the WTO Secretariat's "Made in the World Initiative" (MIWI). The Initiative, which was formally kicked-off in June 2011, highlights the way in which the global economy has become so interconnected that politicians' traditional preoccupation with trade deficits may be irrelevant. The Initiative's debut study, conducted by Japan's Institute of Developing Economies (IDE), reveals that global economic activity seriously overstates the "problem" of trade balances because most advanced goods are composed of components from multiple sources, cross national boundaries several times in the course of their production, and integrate additional elements like services, design and intellectual property, so that it is no longer appropriate to refer to them as the product of any one country. Instead, they should be designated as "Made in the World".[5] The IDE study infers that, at least for the moment, the phenomena of interdependence is really an issue of statistical measurement, of numbers and empiricism, rather than anything more.

At the same time, the WTO is not simply an organization devoted to the exchange of trade concessions and the measurement of their interaction in quantitative terms. Over the last two decades it has developed an impressive, and occasionally controversial, dispute settlement system that highlights the WTO Agreement as a system of law. Examining this development it is possible to wonder what the role of law is in the interdependence that MIWI emphasizes? Is interdependence purely a quantitative issue, or does it have *qualitative* consequences?

What I suggest in this contribution is that law, including WTO law, traditionally has difficulty dealing with interdependence due to the atomized way in which law is arranged. At the risk of some simplification, the architecture of law can be understood as the assembly of rights and obligations. The phrase "rights and obligations" is in fact well-known in WTO law.[6] What I maintain in this article, however, is that a legal

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[2] For a discussion of the eruption of the Eyjafjallajökull volcano in Iceland in April 2010 and its disruptive effect on European supply chains see Urs Uhlmann, "Eruption Disruption" *Canadian Underwriter* 18 (Aug. 2010).

[3] The March 2011 Great Tohoku Earthquake and Tsunami devastated the northeast coast of Japan with the most powerful natural disaster in Japan's modern history. Over 4 million units of vehicle production were lost because of the disasters in Japan, with 90% of them from Japanese automakers. Manufacturing in several sectors in China, Southeast Asia and the U.S. was affected for several months thereafter because of northeastern Japan's linchpin status in global supply chain networks. Bill Canis, "The Motor Vehicle Supply Chain: Effects of the Japanese Earthquake and Tsunami", *Congressional Research Service* R41831 (23 May 2011).

[4] Tony Blair, "What I've Learned" *The Economist* (31 May 2007).

[5] See IDE-JETRO, *Trade Patterns and Global Value Chains in East Asia* (2010) [hereinafter *Trade Patterns*].

[6] See GATT Art. XXIV:1 ("the provisions of this paragraph shall not be construed to create any *rights or obligations* as between two or more customs territories); SPS Art. 2 ("Basic *Rights and Obligations*"); DSU Art. 3.2 ("The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the *rights and*

system's stress upon "rights" and "obligations" obscures the natural way in which these two basic legal elements interact and are, in their operation, themselves a manifestation of interdependence. Bearers of individual rights and obligations need them to regulate their relationship, and a single "right" or "obligation" will be sustained by many other supporting rights and obligations.[7] These can be thought of coordinately as the basic elements of a legal system.

So far, many analyses of WTO law have neglected this aspect of the law – interdependence – because the law itself does not appear outwardly to conform to a model of interrelation. Much of the early experience with WTO law has, in fact, been seen through the filter of WTO dispute settlement which appears, superficially at least, to be concerned with singular, or clusters of, obligations, as in the *EC – Bananas* case, where the issue revolved around the EC's obligation to apply an MFN tariff, or more rarely, with the vindication of rights, as in the *EC – Tariff Preferences* case, where the issue was the EC's right to apply differential conditionality as a test for a country's access of certain trade-related benefits.[8] Because of this artificial segregation, the fact that legal rules are about interdependence may be easy to miss. Thus, WTO law may have more in common with MIWI than is at first evident or is commonly supposed.

These points are important to understand and appreciate because the global economy is becoming characterized by webs of cooperation that involve ever more proximate and intensive interdependence. Evolutionary psychology suggests that this interdependence is becoming more pervasive so that we may not be able to live without it. It is, in fact, so pervasive, that we take it for granted, from the orange juice on our tables every morning to the music we listen to made from synthesized sound tracks involving hundreds of artists around the world. Yet it is also changing the way we *think* - and that we *must think* - in an era of globalization. This has implications for the shape of international law generally.

In 1964 Wolfgang Friedmann posited the view of international law as a "law of cooperation".[9] The ideas put forward in this article regard the actual state of international law, at least in the realm of WTO law, as now surpassing Friedmann's conception. They infer that WTO law is developing along a much steeper trajectory of collaboration and driven by a much more intensive degree of interaction than Friedmann foresaw, one that I term a "law of interdependence". In contrast with Friedmann's conception, the law of interdependence goes beyond a *voluntary* desire to cooperate and evidences an *obligatory* impulse to collaborate. Simply put, countries can no longer isolate themselves from the global trading system without putting themselves at a disadvantage. We have become the subjects of interdependence.

## 2. From Interface to Interdependence

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*obligations* of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the *rights and obligations* provided in the covered agreements."). For instance, in *Argentina – Footwear Safeguards*, WT/DS121/R (25 June 1999), the panel stated that the WTO Safeguards Agreement represented "a re-establishment of multilateral control" over safeguard action, something which "implies a new balance of *rights and obligations* that in some cases modifies the *whole package of rights and obligations* resulting from the Uruguay Round negotiations." (Ibid., para. 8.58). Similarly, in discussing the scope of the 'safe haven' to WTO subsidies disciplines in *Brazil – Aircraft*, WT/DS46/RW/2 (26 July 2001), the panel observed that existing arrangements "reflects a negotiated balance of *rights and obligations*, which is not for a panel to upset." (Ibid., note 86.) The panel went on to observe that "If the Participants were to abuse their power to modify the scope of the safe haven, the recourse of other Members would be to renegotiate the second paragraph of item (k)." It added, ""It should be pointed out that the various exceptions provided for in the WTO Agreement are an integral and important part of the carefully negotiated balance of *rights and obligations* of Members." And in discussing entitlement to invoke countermeasures in *US – FSC*, WT/DS108/ARB (30 Aug. 2002), the arbitrator observed that "the entitlement to countermeasures is to be assessed in light of the legal status of the wrongful act and the manner in which the breach of that obligation has upset the balance of *rights and obligations* as between Members." (Ibid., para. 5.24).

[7] The matrix of a legal system may be said to approximate what Philip Allott has described as "a network of infinite density and complexity in which everything, without exception, is subject to countless legal relations." Philip Allott, *The Health of Nations* 85 (2002). Thus, "… the relationship between two legal persons can be analyzed in many different ways and … an analysis in terms of one particular legal relation always implies the existence of *many other supporting legal relations* … ." Philip Allott, *Eunomia*, p. 162 (¶10.50) (1990) [emphasis added].

[8] *EC – Bananas*, WT/DS27; *EC – Tariff Preferences*, WT/DS246.

[9] Wolfgang Friedmann, *The Changing Structure of International Law* 61-62 (1964). Friedmann characterized the change as follows: "This move of international society, from an essentially negative code of rules of abstention to positive rules of cooperation, however fragmentary in the present state of world politics, is an evolution of immense significance for the principles and structure of international law." Ibid., p. 62.

Interdependence arises in the mutual reliance of actors upon each other. It originates in our biology, something that has been intuited by other theorists and commentators of international law. Thus, Emmerich de Vattel observed in *The Law of Nations* (1758):

> Such is man's nature that he is not sufficient unto himself and necessarily stands in need of the assistance and intercourse of his fellows, whether to preserve his life or to perfect himself and live as befits a rational animal … From this source we deduce a natural society existing among all men. The general law of the society is that each member should assist the others in all their needs, as far as he can do so without neglecting his duties to himself – a law which all men must obey if they are to live comformably to their nature and to the designs of their common Creator; a law which our own welfare, our happiness, and our best interests should render sacred to each of us. Such is the general obligation we are under of performing our duties; let us fulfil them with care if we would work wisely for our greatest good.[10]

Interdependence, like many abstract ideas, is a difficult subject to address, both because it is so pervasive and so fleeting. Interdependence exists as an independent phenomenon, and yet at the same time, it is woven into the fabric of everything else. We have to think long and hard before accepting its primacy as an explanation for the shape of the law.

Developments in communication, manufacturing, logistics and retailing over the last two decades have led to the globalization of production.[11] For this most part, production now takes place in immense, highly sophisticated supply chains that span the globe and ensure the smooth flow of product from input suppliers to the ultimate consumer. Participants must be nimble and broad-minded. The conceptual modifications required are profound. Alan Waller has observed:

> The difference in skill requirements in today's highly competitive fast-changing world is that we need to have visibility and control of our supply chain in order to compete. Manufacturers need to think upstream about supply and *be driven by the end customer*. Retailers need to satisfy their customers but need to think supply chain to achieve this. Wal-Mart sees their core skill as being 'A procurement agent for the consumer', hence their focus on supply chain management in all that they do.[12]

Other supply chain experts have pointed out that supply chain manufacturing requires participants to shift from mere 'interfacing' to integrating their production. Supplier selection becomes supplier collaboration. Arm's length relationships are replaced by total commitment. Confrontational behaviour makes way for integrated forms of cooperation. Short-term planning is exchanged for longer term thinking.[13] In sum, a transactional perspective is replaced by a relational one that emphasizes the linkage of the parties across time.[14] Individual components become part of a greater whole.

Inevitably, this configuration requires the removal of barriers so that the entirety of production, which can involve many stages among a number of independent contractors, become a common enterprise. Stuart

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[10] Emmerich de Vattel, *The Law of Nations, or the Principles of Natural Law, applied to the Conduct and to the Affairs of Nations and Sovereigns* (1758) (tr. C.G. Fenwick) 5 (1916), quoted in Philip Allott, *The Health of Nations* 414, n. 6 (2002).

[11] Stephen Poloz, former Chief Economist of Export Development Canada (EDC) points out that 'globalization' has three separate dimensions: globalization of sales, production and distribution. Stephen Poloz, *The New Global Trade Game: Will Canada be a Player, or just a Spectator?* available at http://www.edc.ca/english/docs/speeches/2005/mediaroom_7001.htm.

[12] Alan Waller, Foreward in Stuart Emmett & Barry Crocker, *The Relationship-Driven Supply Chain* 2 (2006) [emphasis added].

[13] Stuart Emmett & Barry Crocker, *The Relationship-Driven Supply Chain* 32 (2006).

[14] Interdependence has also been recognized at a political level by leading statespersons: see for instance See also Kofi Annan, "The Meaning of the International Community" U.N. Press Release, SG/SM/7133, PI/1176 (15 Sept. 1999) ("Ours is a world in which no individual, and no country, exists in isolation. All of us live simultaneously in our own communities and in the world at large … We are connected, wired, interdependent."); Tony Blair, "What I've Learned" *The Economist* (31 May 2007) (referring to interdependence as "the defining characteristic of the modern world"); The White House, "Remarks on A New Beginning" made to students at Cairo University (4 June 2009) (Barack Obama observing that "Given our interdependence, any world order that elevates one nation or group of people over another will inevitably fail. So whatever we think of the past, we must not be prisoners to it. Our problems must be dealt with through partnership; our progress must be shared.").

Emmett and Barry Crocker have observed:

> In a world-class supply chain … barriers cannot remain. It cannot be that the flow of product, information and finances between the links in the chain are allowed to be compromised by the perception of company boundaries. Despite the fact that supply chains are made up of different companies and that there may be both legal restriction and operational difficulties, these must be overcome so that the supply chain is treated as a whole and is optimised as a whole.[15]

In some cases, this degree of unity and integration creates something new that one dominant participant is interested in holding on to because it aligns with a company's core functions. The supply chain is something of value that an enterprise is interested in preserving and exploiting over time. In other cases, the supply chain may represent an expense or a threat for a participant and so the pattern of relationships is ended.[16] In still others, corporate reorganizations may spinoff part or all of the chain as one participant transitions to new operations under different conditions. The supply chain, now reconfigured, will draw on pre-existing patterns of relationships and behavioural memory to fulfill some new function.

Each of these possible supply chain outcomes depends upon the product in question, the actors involved, and a host of other factors that impact upon a supply chain's resilience and integrity. Like living organisms, supply chains exhibit distinct identities. They evolve and are adaptive. Very few are completely alike.

They are also sensitive. The need for smooth interaction of many parts exposes supply chains to disruptions and makes then vulnerable to external shocks and opportunistic behaviour. Thus, the requirement for a 'unity' of operation can both beneficial and detrimental.

The independent persona of the supply chain is, in addition, something that can have consequences in law. For legal purposes the supply chain can assume certain attributes of personality, which is especially important to those who are interested in differentiating their product from competitors. In environmental products, 'fair' trade and organic certification, for instance, the chain itself becomes the source of intellectual property, such as in a designation of 'traditional speciality guaranteed', or trademark.[17] Potential participants have to commit to meeting certain requirements in order to become involved.

Experts have also noticed a recurrent feature of supply chains. This is the fact that as supply chains mature and their outputs become subject to greater competition, power shifts to the 'end' of the supply chain.[18] Consumers and purchasers become more important, leading to a culture of "Just Say Yes".[19] Walmart, like many other large retailers, routinely uses its enormous marketing clout to wrest continuous discounts from suppliers, a tactic that promotes a "race to the bottom" as upstream suppliers perennially scout for the most cost-effective source. In certain industries, this movement is offset to a degree by the desire to ensure quality control and preserve supplier ties.

Legal analysis may be tempted to reduce the various interacting elements of a legal system to 'rights' and 'obligations', and indeed for the purposes of manageability often must do so. Nevertheless, the law's natural reductivism should not obscure the fact that what is being contemplated in *any* legal analysis is, in some sense, the reflection a series of relationships embodying interdependence. Interdependence is characteristic of virtually all human endeavour and is why individuals who come together in the form of communities must

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[15] Ibid., 8.

[16] For instance, a particular type of customer with special needs may be one that the principal supplier decides not to cater to due to capacity constraints or shift in focus it would require of the business model. This dilemma is often encapsulated in the business adage, 'Do Not Serve Customers You Cannot Satisfy'. See John Mentzer, *Fundamentals of Supply Chain Management* 100 (2004).

[17] 'Traditional Speciality Guaranteed' (TSG) is a designation under EU legislation that refers to foods that either by virtue of raw materials, production method or processing features are distinctive and therefore protected. It has been in place since 1992. For discussion see Andrea Tosato, "The Protection of Traditional Food in the EU: Traditional Specialities Guaranteed", 19:4 *Eur. L.J.* 545 (2013).

[18] William Copacino, *Supply Chain Management* 42 (1997).

[19] "Most manufacturing companies today are being pressed by their customers to provide more for less – that is, lower prices, greater value, higher levels of customer service, and additional value-added services." Ibid., 39.

agree on the assignment of rights and obligations. There must be responsibility and there must be reciprocity, even if that reciprocity is not always equal.

**3. Interdependence in WTO Law**

In this article I take the view that all law can, in one form or another, be understood as being about interdependence. We often say that for there to be a right, there must be a corresponding obligation (i.e. right = obligation).[20] Yet the manifestation of this basic relationship is not immediately apparent. To maintain that law – or international law – is ultimately about interdependence seems far-fetched, especially when looked at through the frame of individual legal rules and disputes. How is it possible, for instance, to assert that a rule concerning maritime delimitation or immunity or *jus cogens* are really about interdependence? At this level of scrutiny the link with interdependence is hard to see.

Interdependence is likewise a difficult subject to identify in WTO law. The WTO Agreement never expressly employs the term "interdependence" and WTO panels and the Appellate Body have only rarely referred to it. Still, considered carefully, one can see that interdependence is a pervasive theme throughout the treaty. Several descriptions offered by panels and the Appellate Body illustrate the material way in which interdependence generated by trade concessions is transforming the global economy. For example, the panel in *U.S. – Underwear* described the overseas extension of the U.S. textile and clothing industry during the early 1990s as follows:

> In the course of the last six years, there has been a significant change in the US cotton and manmade fibre underwear manufacturing industry which has significantly switched from producing and assembling underwear domestically to producing components in the United States for assembly in other countries and subsequent return to the same enterprises in the United States for marketing. This pattern of co-production has enabled the companies in this industry to maintain their share of the US market by making use of the labour force available outside the country while at the same time controlling the source of raw materials, the production timetable, the types and amounts of underwear to be produced and the marketing of the final product. Moreover, these co-production operations were consistent with the policies of the United States, which was encouraging investment and production in Mexico and the Caribbean Basin.[21]

Similarly, in *Mexico – Telecoms* the panel observed that:

> …. basic telecommunications services supplied between Members do require, during the delivery of the service, *a high degree of interaction* between each other's networks, since the service typically involves a continuous, rapid and often two-way flow of intangible customer and operator data. The interaction results in a seamless service between the originating and terminating segments, which suggests that the service be considered as a single, cross-border service.[22]

And in *U.S. – Aircraft* WTO decision-makers detailed the multinational list of suppliers involved in manufacturing the Boeing 787 Dreamliner:

> Completion of sub-assemblies and integration of systems takes place in Everett, Washington, with many components being pre-installed before delivery to Everett. The 787 composite

[20] Wesley Hohfeld pointed out that the terms "rights" and "obligations" encompass a much wider array of legal relationships than their normal appellation might suggest. One of Hohfeld's most important contributions to the study of jurisprudence was to maintain that there are at least four correlative relationships in law: rights and obligations, privileges and no rights, powers and liabilities, immunities and disabilities. For an outline of these ideas see Wesley Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1917). Yale Faculty Scholarship Series, Paper 4378.

[21] *US – Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/R, para. 2.1 (8 Nov. 1996).

[22] *Mexico – Telecommunications Services*, WT/DS204/R, para. 7.38 (2 Apr. 2004) [emphasis added].

> wings are being manufactured by Mitsubishi Heavy Industries. The horizontal stabilizers are being manufactured by Alenia Aeronautica in Italy, and various parts of the fuselage sections are being built by Alenia in Italy, Vought in Charleston, South Carolina, Kawasaki Heavy Industries and Fuji Heavy Industries in Japan, Alenia in Italy and Spirit Aerosystems in Wichita, Kansas. The main landing gear and nose landing gear are being supplied by the French company Messier-Dowty, while passenger doors are being made by Latécoère in France, and the cargo, access and crew escape doors by Saab in Sweden.[23]

WTO decision-makers in *U.S. – Aircraft* noted that as a result of globalized manufacturing Boeing has "shifted responsibility for detailed component design to suppliers, and focuses on systems integration, managing overall requirements, as well as the assembly process. The 787 is essentially assembled from large substructures designed and produced by suppliers."[24]

The description infers that what has arisen between Boeing and its suppliers is an elaborate network of relationships that is responsible for creating a sophisticated final product made out of components from many sources. Much modern manufacturing is in fact often characterized by these relationships. They value coordination and integration so that manufacturing and delivery of the product becomes, in some sense, unified.

Unification places its own demands on participants in the supply chain. Participants need to consider matters differently. They must develop shared understandings about individual and common goods and must agree on the allocation of rights and obligations between participants, often at great levels of detail. This is because increased interdependence requires increased coordination.

The experience of Boeing and many other companies in the global economy demonstrates the way that interdependence modifies *thinking*, a modification ultimately reflected in the shape of the law. Philip Allott has explained how the transformation generated by international law is chiefly a *mental*, as opposed to a *material*, process:

> To change our idea of the world, to speak of the world in a new way, is to change what our world will become. The road from the ideal to the actual lies, not merely in institutional novelties, or programmes and blueprints for social change, but also, and primarily, in a change of mind.[25]

Perhaps the most graphic manifestation of this demand for a change in thinking is panel and Appellate Body criticism in situations where governments have failed to consider the interests of other member countries. For example, in *U.S. – Gasoline*, the Appellate Body observed that while the introduction of baseline emission requirements for 'clean' gasoline was considered unfeasible in the domestic context, there was "nothing in the record to indicate that [the U.S.] did other than disregard that kind of consideration when it came to foreign refiners." It concluded that "[t]he resulting discrimination must have been foreseen, and was not merely inadvertent or unavoidable."[26] Similarly in *U.S. – Clove Cigarettes*, the panel noted that "[i]t seems to us that the effect of banning cigarettes with characterizing flavours other than menthol is to impose costs on producers in other Members, notably producers in Indonesia, while at the same time imposing no costs on any U.S.

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[23] *United States – Civil Aircraft (Second Complaint)*, WT/DS353/R, Appendix VII.F.1, para. 25 (31 March 2011).

[24] Ibid., para. 24. Former WTO Director-General Pascal Lamy described a similar phenomenon in the global textiles value chain. The chain spans countries involved in the "mere assembly" of imported fabric for export (such as China, Romania and Vietnam); to "original equipment manufacture" where apparel products are manufactured in full, going beyond mere assembly (such as in Turkey); to "original design manufacture" where in addition to full product manufacture a country can create ready-made collections at different levels of sophistication (such as in Turkey and Hong Kong); and all the way to "original brand manufacture" where a country becomes the buyer in the value chain and starts to manage the supply network (such as in the U.S. and Italy). See "What Cannot Be Counted Does Not Count" (speech by WTO Director-General Pascal Lamy to the Economic Development Foundation (IKV) and the Economic Policy Research Foundation of Turkey (TEPAV), Istanbul, 14 Mar. 2013).

[25] Philip Allott, *Eunomia* xxxiii (1990).

[26] WT/DS2/AB/R, p. 28 (29 Apr. 1996).

entity."[27] This criticism can be understood as evidence of the gradual emergence of the idea of a "common good" under WTO law, itself reflective of a developing sense of community. The criticisms can be understood as an exhortation upon governments to consider more than their own narrow interests.[28]

At the same time, with the specialization of function that interdependence allows, governments and countries are also much more careful to define their allocation of rights and obligations. Each participant is more likely to fulfill specific tasks and the degree of refinement must be reflected in legal arrangements, including the definition of WTO law.[29]

So descriptions of interdependence are abundant in WTO case law, yet direct recognition of economic interdependence and the way that it shapes legal rules are rare.[30] The Preamble of the WTO Agreement mentions, for instance, "expanding the production of and trade in goods and services" and "entering into reciprocal and mutually advantageous arrangements" as basic aims of the treaty, but again, these references are generalized and appear not to contemplate the multi-dimensional, tentacular way that modern manufacturing and service supply has evolved since the WTO Agreement was concluded in 1994. Thus, the multinational nature of many supply and value chains coexists uneasily with a state-based system of international trade governance.

For instance, there are a number of WTO provisions that presuppose the interdependence of producers and consumers in supply chains. Article 3.1 of the WTO Safeguards Agreement provides, for instance, that:

> A Member may apply a safeguard measure only following an investigation by the competent authorities … This investigation shall include reasonable public notice to all interested parties and public hearings or other appropriate means in which importers, exporters and other interested parties could present evidence and their views, including the opportunity to respond to the presentations of other parties and to submit their views, inter alia, as to whether or not the application of a safeguard measure would be in the public interest.

The safeguard provision thus requires an "investigation", with notice to "importers, exporters and other interested parties" and an assessment of whether the proposed safeguard would be in the broad "public interest". What the provision foresees is an assessment of competing needs for the import, including the needs of competitors, consumers and downstream users of the product as an input. Likewise, in Arts 6.11-12 of the WTO Antidumping Agreement and Art. 19.2 of the WTO Subsidies and Countervailing Measures Agreement national authorities contemplating trade action are encouraged to give consideration to up- and downstream

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[27] WT/DS406/R, para. 7.289 (2 Sept. 2011).

[28] Indeed, as part of WTO arrangements they are now in many instances required to do so. For instance, TBT Art. 2.9 includes obligations requiring notification and comment in national standard-setting whenever a relevant international standard does not exist or the technical content of a proposed technical regulation is not in accordance with the technical content of relevant international standards.and the international and regional organizations operating within the framework of the International Plant Protection Convention …". Likewise, SPS Art. 3.4 provides that "Members shall play a full part, within the limits of their resources, in the relevant international organizations and their subsidiary bodies, in particular the Codex Alimentarius Commission, the International Office of Epizootics, , to promote within these organizations the development and periodic review of standards, guidelines and recommendations with respect to all aspects of sanitary and phytosanitary measures."

[29] This is particularly evident, for instance, in instruments of international commercial law such as the International Chamber of Commerce's International Commercial Terms (INCOTERMS) which were first introduced in 1936 but which, in their latest version introduced in 2010, now require a specific address for delivery.

[30] For additional recognition of supply chain relationships in WTO case law see *Canada – Autos*, WT/DS139/R, WT/DS142/R, para. 10.254 (11 Feb. 2000) (referring to "vertical integration and exclusive distribution arrangements between manufacturers and wholesalers in the motor vehicle industry"); *EC – Bananas*, WT/DS27/ARB, para. 6.12 (9 April 1999) (refusing to acknowledge "losses of US exports in goods or services *between the US and third countries* … [as] constitute[ing] nullification or impairment of even *indirect* benefits accruing to the United States under the GATT or the GATS for which the European Communities could face suspension of concessions. To the extent the US assessment of nullification or impairment includes *lost US exports* defined as *US content incorporated in Latin American bananas* (e.g. US fertilizer, pesticides and machinery shipped to Latin America and US capital or management services used in banana cultivation), we do not consider such lost US exports …" [emphasis in original]); *EC – Sugar (Australia)*, WT/DS265/AB/R, para. 279 (28 April 2005) (observing that "that economic effects of WTO-consistent domestic support may "spill over" to benefit export production. Such spill-over effects may arise, in particular, in circumstances where agricultural products result from a single line of production that does not distinguish between production destined for the domestic market and production destined for the export market."); *Mexico – Olive Oil*, WT/DS341/R, para. 7.202 (4 Sept. 2008); *Mexico – Telecoms*, WT/DS204/R, para. 7.40 (2 April 2004); *U.S. – Cotton*, WT/DS267/ARB/2, para. 5.149 (31 Aug. 2009) (noting that "it may be especially difficult to have recourse to alternative suppliers [for the purposes of retaliation] without significantly upsetting the supply chain.").

interests that might be affected by anti-dumping or countervailing measures. In this sense WTO law is not purely *product*-oriented. In the realm of trade restrictions, in particular, it aims to take account of the wider interests potentially in issue due to economic linkage.

Interdependence is also a noticeable feature of WTO dispute settlement where, despite a superficially 'bilateral' aspect to disputes, rules have evolved to accommodate relatively liberal rights of participation for third parties. For instance, DSU Art. 10.1 provides:

> The interests of the parties to a dispute and *those of other Members under a covered agreement at issue* in the dispute shall be fully taken into account during the panel process. [31]

Commenting on these rules the panel in *Australia – Apples* noted that "not only have third parties the *right* to make submissions in a dispute, but panels have the *legal obligation* to consider them."[32] Again, this is different from other international legal systems like the International Court of Justice, international investment arbitration or international criminal law, where bilateral emphasis in litigation is much more pronounced.[33] This characteristic speaks to the multipolarity of many WTO disputes and the way that the definition of WTO law is part of a broader common endeavour.[34]

Still, references recognizing the express connection between legal and substantive interdependence are comparatively rare. One reference occurred in *EC - Bananas III*, a dispute involving a large number of Latin American, Caribbean, African and Asian suppliers of bananas to the EC market. Complainants included the United States, a negligible exporter of bananas. Arbitrators therefore had to contend with the EC assertion that the U.S. lacked a exporter interest and could not seek to retaliate. In dismissing the EC's objection the arbitrators observed:

> Indeed, with the increased interdependence of the global economy, which means that actions taken in one country are likely to have significant effects on trade and foreign direct investment flows in others, Members have a greater stake in enforcing WTO rules than in the past since any deviation from the negotiated balance of rights and obligations is more likely than ever to affect them, directly or indirectly. Since the United States is likely to be affected by the EC regime, it would have an interest in a determination of whether the EC regime is inconsistent with the requirements of WTO rules. Thus, in our view a Member's potential interest in trade in goods or services and its interest in a determination of rights and obligations under the WTO Agreement are each sufficient to establish a right to pursue a WTO dispute settlement proceeding.[35]

The reluctance to refer more directly to interdependence may stem from a pragmatic appraisal that the concept

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[31] Emphasis added.

[32] *Australia – Measures Affecting the Importation of Applies from New Zealand*, WT/DS367/R, para. 7.76 (9 Aug. 2010) [emphasis added]. See also *U.S. – Shrimp*, WT/DS58/AB/R, para. 101 (12 Oct. 1998). For the difficulties of doing so see *Canada – Wheat*, WT/DS276/R, para. 6.6ff (6 Apr. 2004). For instances where panels have actively considered third party submissions, in some cases even preferring them to submissions by the parties see *EC – Bed Linen*, WT/DS141/AB/R para. 142-144 (8 Apr. 2003), *U.S. – Cotton*, WT/DS257/R, para. 7.443 (8 Sept. 2004), *United States – Softwood Lumber from Canada*, WT/DS264/AB/RW, para. 98, 112 (15 Aug. 2006); U.S. –Aircraft, WT/DS353/R para. 7.767 (31 Mar. 2011). Panels have often noted that WTO dispute settlement has consequences for third parties. Third parties also play an important role in surveillance, monitoring and general 'fine-tuning' of rights and obligations raised in dispute settlement. See, for instance, submissions by the EC in *Canada – Aircraft (21.5)*, WT/DS70/AB/RW, para. 19 (21 July 2000). At the same time, the potential number of third parties in any dispute appears to have resulted in a slight tightening of requirements for third party standing as compared with dispute settlement under GATT, particularly in cases where 'enhanced' standing is requested: see *United States – Anti-Dumping Act of 1916*, WT/DS162/R, para. 6.33 (29 Mar. 2000); *EC – Aircraft*, WT/DS316/R, para. 7.166 (30 June 2010); U.S. – Aircraft, WT/DS353/R, para. 7.16 (31 Mar. 2011); *EC – Bananas*, WT/DS/ARB, para. 2.8 (9 Sept. 1999) (re third parties in compliance proceedings).

[33] See Christine Chinkin, *Third Parties in International Law* (1994). More recently some commentators have detected a slight relaxation in the ICJ's traditionally restrictive interpretation of requests to intervene under ICJ Statute Arts. 62-63. See Paolo Palchetti, "Opening the International Court of Justice to Third States", 6 *Max Planck U.N.Y.B.* 139 (2002).

[34] Cases involving large numbers of third parties are numerous, including *EC – Sugar* (25 third parties), *EC – Bananas* (20 third parties), *U.S. – Zeroing*, (WT/DS294 - 11 third parties), *U.S. – Cotton* (13 third parties), *U.S. – Section 301* (17 third parties), *China – Raw Materials* (WT/DS394 - 16 third parties).

[35] *EC – Bananas*, WT/DS27/R/USA, para. 7.50 (22 May 1997).

of interconnection can only be taken so far. Taken to extremes, anything can be linked to anything, emptying the concept of meaningful content.

Thus, whereas interdependence is evident in certain aspects of WTO law, there are limits to its recognition. As a result, WTO law can appear curiously double-aspected. For instance, while WTO law contains a relatively expansive definition of who can participate in a safeguard hearing, as outlined above, the *initiation* of a safeguard complaint is restricted to members of a defined "industry". Several GATT and WTO decisions have also made clear that, despite the integrated nature of many production processes, the term "industry" is to be interpreted restrictively, consistent with the character of safeguards as an exceptional countermeasure to "fair" trade. The right of initiation is limited to producers of the *product*, not those involved in the *process* by which a product is made.[36]

A second area where interdependence is problematic is with respect to "pass-through" analysis in countervailing action. Here, the issue that arises is whether or not subsidies received by an input producer or product may be assessed for the purposes of countervailing action against downstream products. Several GATT and WTO panels have considered a variety of circumstances involving the potential for pass-through determinations.[37] To date, the GATT/WTO jurisprudence has established that for an indirect input subsidy to be countervailed, the investigating authority needs to conduct a pass-through test.[38] The main principle is that the national authority is not allowed to base its findings on a mere presumption of subsidy transmission from an input producer to a producer of the processed product if they operate at arm's length from each other. Proposals made in the Doha Development Round generally reflect and develop this principle further. Codification of the pass-through principle would bring more clarity and consistency to this area given the potential 'shadow' that a subsidy presents for the remainder of the production chain.

Still another area where interdependence is problematic is in the retaliation phase of WTO dispute settlement. Arbitrators and commentators have voiced concern about the difficulties that retaliation poses for secondary or downstream users of products which may be targeted as part of selective market closure. Their inclusion within supply chains makes the authorization to retaliate of questionable value. In *EC – Bananas III (Ecuador) (Art. 22.6 – EC)*, for instance, the arbitrator examining Ecuador's request to retaliate in a non-correspondent sector against EC restrictions on Ecuadorian banana exports observed that Ecuador was a developing country with little industrial infrastructure and, consequently, the suspension of concessions in relation to capital, intermediate or other input goods, which constitute direct inputs into domestic production, has the potential to be damaging to Ecuadorian economic operators. As a result, the arbitrator referred to the possibility of retaliation in the field of services and intellectual property.[39]

Likewise, in *U.S. – Cotton*, a dispute involving claims by Brazil that the U.S. continued to subsidize U.S. agricultural producers beyond limits permitted under the WTO Agreement on Agriculture, the arbitrator assessing Brazil's proposal to retaliate in non-correspondent sectors had to determine whether the proposal was "practicable or effective" as required under DSU Art. 23:3. The prevalence of vertical integration meant that one consideration the arbitrators had to take into account was whether it would be especially difficult to have recourse to alternative suppliers without significantly upsetting the supply chain. The arbitrators concluded that:

> While there is no exact mathematical precision to this determination, we consider that, for the purposes of our assessment in these proceedings, a US share of imports of 20 per cent

[36] Thus, in *U.S. – Lamb* for instance, the panel noted that "the factor of economic interdependence between producers of raw, intermediate and final products is not relevant for the industry definition." The panel also observed the difficulty of quantifying interdependence for the purposes of defining which economic operators could be part of an "industry". See *U.S. – Lamb*, WT/DS177/R, para. 7.83 (21 Dec. 2000); see also *U.S. – Lamb*, WT/DS177/AB/R, para. 94 (1 May 2001). For GATT decisions see *United States – Definition of Industry Concerning Wine and Grape Products*, SCM/71, B.I.S.D. 39S/436 (adopted by the SCM Committee on 28 April 1992); *Canada – Imposition of Countervailing Duties on Imports of Manufacturing Beef from the EEC*, SCM/85 (13 Oct. 1987) (not adopted).

[37] See for instance *US – Lead and Bismuth II*, WT/DS138; *US – Certain EC Products*, WT/DS212.

[38] Sherzod Shadikhodjaev, "How to Pass a Pass-Through Test: The Case of Input Subsidies" 15:2 *J.I.E.L.* 621 (2012).

[39] *EC – Bananas (22.6 – Ecuador)*, WT/DS27/ARB/ECU, para. 173 (24 March 2000).

> constitutes a reasonable threshold by which to estimate the extent to which Brazil may be able to find alternative sources of supply for these three remaining categories of consumer goods imports.[40]

These determinations mean that the multi-dimensional quality of interdependence as a concept makes it hard to accommodate within the framework of WTO law. Everything cannot be related to everything else, and yet, in some sense, it is.

**4. Made in the World**

The many references above suggest that no clear picture of interdependence has emerged in WTO law yet. It is a polarizing subject, one which tugs in different directions, although more recently there are some indications that it is being accorded attention in WTO thinking. In 2010 the WTO Secretariat launched a "Made in the World Initiative" to provide a better evaluation of international trade to an economy and to highlight economic interdependence, the contribution of services to trade and improved assessments of "value added". MIWI's kick-off crystallized in the form of a report, *Trade Patterns and Global Value Chains in East Asia*, issued in 2010 and co-sponsored by Institute of Developing Economies, an arm of the Japan External Trade Organization (JETRO), and the WTO Secretariat.[41]

The central premise of MIWI and the *Trade Patterns* report is that national borders do not matter as much as they once did. The report observed "that much of [international] trade these days comprises components or intermediate goods and services that pass from economy to economy before becoming part of a final traded product." The report noted that:

> The distinction between "them" and "us" that has traditionally defined our way of thinking about imports and exports is increasingly outmoded. Products are no longer "made in Japan", or "made in France"; they are truly "made in the world".[42]

According to the report this reformulation "redefines the nature of trade relations that are now characterized by a much closer inter-relationship." Consequently, the report maintains that "we need to promote a conceptual and statistical shift in the way trade is most commonly perceived in policy debates."

Using the experience of the "Asian success story", *Trade Patterns* highlights the way that "increasing fragmentation of value chains has led to an increase in trade flows in intermediate goods."[43] Consequently, "[s]pecialization is no longer based on the overall balance of comparative advantage of countries in producing a final good, but on the comparative advantage of "tasks" that these countries complete at a specific step along the global value chain." *Trade Patterns* notes the profile of countries that have achieved success by integrating into supply- and value-chain manufacturing. It includes low tariffs on semi-processed goods, good logistics, upgraded infrastructure, and foreign direct investment as an essential part of the offshoring strategies of multinational companies.

The report reveals "a dialectical relationship characterized by significant structural diversity on the one hand and a high degree of complementarity on the other one."[44] This complementarity of production "is both a cause and an outcome of deepening economic interdependency among countries." The report outlines the following consequence:

> Global value chains translate into "trade in tasks", with partners specializing in specific skills according to their comparative advantage. This creates new trade and job opportunities, the

[40] *U.S. – Cotton*, WT/DS267/ARB/2, para. 5.181 (31 Aug. 2009).
[41] See IDE-JETRO, *Trade Patterns and Global Value Chains in East Asia* (2010) [hereinafter *Trade Patterns*].
[42] T*rade Patterns*, p. 3.
[43] Ibid., p. 4.
[44] Ibid., p. 5.

> net balance of which depends on the labour intensity of the products and the overall trade balance of each economy.[45]

*Trade Patterns* does a good job of providing an introduction to the phenomenon of interdependence, but the report also emphasizes how interdependence challenges the WTO's existing regulatory structure. Since the report's release the organization has struggled to accommodate this phenomenon and appears to be unsure of its place in a state-centric system.

The MIWI agenda is an uncertain one of symposia and studies, but as yet, little in the way of specific policy prescriptions for the organization itself. At the moment most of its focus is statistical and empiric rather than normative. If interdependence is now so pervasive and if it challenges the state-centered model of "rights and obligations", what is the solution? The Secretariat provides no immediate answer to this question, and indeed, there may be none. Instead, in introducing the IDE-JETRO report the then-WTO Director General Pascal Lamy called upon the global public to "pursue the dialogue virtually" through a website.

It is also easy to be a little suspicious of MIWI. It rose to prominence after a keynote speech by one of the WTO deputy director generals, Alejandro Jara, in May 2010. MIWI can be seen to fulfil an ambition of developing countries, some of which want to promote more of a development dimension in the WTO and hence stress the idea of "trade in tasks".[46] As such, it may be regarded as a sop. Since the accession of the new WTO Director-General, Roberto Azevedo, in May 2013, institutional attention to MIWI has fallen off, at least if indications on the WTO website are to be taken at face value. The section of the site devoted specifically to MIWI has only been minimally updated.

## 5. Conclusion

A comprehensive idea of WTO law suggests that greater interdependence is the ultimate product of WTO concessions and commitments. However, the sheer inability to grapple with and 'de-construct' interdependence, to fix and put a number to it, may be an indication of its "oneness", its centrality and fundamentality. The behaviour of countries in the resolution of several WTO-related matters suggests that they intuit this point, something that may presage a greater role for *qualitative* as opposed to *quantitative* measures of trade benefit in future.[47]

All of the above, however, does not obscure the fact that interdependence is not a neutral value, not unreservedly positive. The reference to "chains" in supply- and value-chains can be understood as a contemporary form of bondage.[48] Feminism, in particular, has done much in the past century to unmask the matrices of power in traditional relationships that result in subordination. Critical legal scholars such as Martti Koskenniemi have also condemned interdependence as simply another justification for communitarian thinking - thinking that is but one part of a flawed "international legal project".[49] These reservations suggest

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[45] Ibid.

[46] Behind the re-characterization is the more general idea that there should be a focus on "equitable and efficient dispersal" of the three factors of production – capital, knowledge, and labor. Existing trade statistics are therefore, at most, incidental. This opinion is part of a broader set of convictions that past trade talks have consistently delivered unbalanced trade deals favoring the richer industrial states over their poorer, less able developing counterparts as well as a fear that ongoing negotiations over a "Trans-Pacific Partnership" are a U.S.-led attempt to divide the Asia region and contain the rise of China.

[47] A number of commentators have written of the difficulty of deepening transnational integration when quantification is problematic. For an overview see Geza Feketekuty, "Appendix: A Guide to Services Negotiations" in Aaditya Mattoo et al., *A Handbook of International Trade in Services* ("The shortcomings of the trade data are compounded by the difficulty of making a quantitative assessment of the degree of protection provided by regulatory measures. It is much easier to calculate the protection provided by a tariff or a quota than the protection provided by a regulatory measure. Negotiators in services thus lack the kind of detailed data that would enable them to estimate the impact of negotiated reductions in particular barriers …" p. 553).

[48] Stewart Macaulay has written about the negative effects of interdependence: "Even discrete transactions take place within a setting of continuing relationships and interdependence. The value of these relationships means that all involved must work to satisfy each other. Potential disputes are suppressed, ignored, or compromised in the service of keeping the relationship alive … Power, exploitation, and dependence are also significant. Continuing relationships are not necessarily nice. The value of arrangements walks some people interdependent positions. They can only take orders." Stewart Macaulay, "An Empirical View of Contract" *Wis. L. Rev.* 465 (1985).

[49] Koskenniemi's principal argument is "[e]ach general principle [of international law] seems capable of being opposed with an equally valid counterprinciple" (p. 3), a recurrent development that "reproduces the paradoxes and ambivalences of a liberal theory of politics" (p. xliii) and

that interdependence needs to be constantly be questioned and re-evaluated going forward.

that, consequently, any appeal to theory "merely reproduces the conflicts at a higher level of abstraction." (p. 3) He goes on to observe, "[i]f international law is indeterminate, then there is no limit to the extent that it can be used to justify … existing practices." (Ibid., pp. 614-615) Koskenniemi describes communitarian thinking as emerging in three standard forms: a Grotian tradition, interdependence, or the appeal to a *conscience universelle*. He criticizes interdependence as a trope, or form of argument, based on the premise that "Humanity today, taking into consideration the whole world, knows that 'one world' has become the imperative of survival." In Koskenniemi's view these sorts of arguments "start[] from a negative experience of autonomy as egoism and proceeds so as to compel normative order by referring to norms "naturally" given by the needs of interdependence." See Martti Koskenniemi, *From Apology to Utopia* 477 (2005). My objections to Koskenniemi, based on the theory put forward in this book, are that WTO law is premised on an idea of justice that prioritizes equality over fairness (i.e. equality > fairness), and therefore, any general principle is *not* automatically capable of being opposed by an "equally valid counterprinciple". With respect to interdependence, I maintain that interdependence needs to be understood not simply as an argument, but as a *fact*. For examination of interdependence as less than it might be see the DHL Global Connectedness Index and "Going Backwards" 405:8816 *The Economist* 105 (22 Dec. 2012).